MOTION FILED

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No. 09-700

IN THE
Supreme Court of the United States

HOMAIDAN AL-TURKI,
Petitioner,

v.

THE PEOPLE OF
THE STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari
to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE AND BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

As *amicus curiae*, the Kingdom of Saudi Arabia, respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.2(b). Counsel for Petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for Respondent has withheld consent.[1]

The Kingdom of Saudi Arabia seeks to assure that its citizens abroad are accorded the rights and protections that are accorded to the citizens of their host countries. Saudi Arabia has a substantial interest in ensuring that its citizens are accorded a right to a fair trial when prosecuted in the United States and, in particular, that they do not suffer bias because they are Arabs or Muslims.

Therefore, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

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[1] Counsel of record for all parties received notice of *amicus curiae's* intent to file this brief at least ten days prior to its due date.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The Kingdom of Saudi Arabia ("Kingdom" or "Saudi Arabia") respectfully submits this *amicus curiae* brief to inform this Court of Saudi Arabia's concerns with Petitioner's claims that he was deprived of the right to a fair and impartial jury through prejudicial error committed by a trial judge in the State of Colorado and to underscore the important reasons for the Court to grant the writ petition.[2]

The government of Saudi Arabia seeks to assure that its citizens abroad are accorded the rights and protections that are accorded to the citizens of their host countries. Saudi Arabia has a substantial interest in ensuring that its citizens receive a fair trial when prosecuted in the United States and, in particular, that they do not suffer bias because they are Arabs or Muslims.

This case has been closely followed at the highest levels of the government of Saudi Arabia. The issue raised herein is of importance to the Saudi people, including the several thousand Saudi students attending colleges and universities in the United States who have followed the case with the concern that nationals of Saudi Arabia may be

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[2] Pursuant to Rule 37.6 of the Court, *amicus* affirms that no counsel for a party has authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief.

deprived of the right to trial by impartial jury that is accorded to U.S. citizens.[3]

The government of Saudi Arabia notes that the documented adverse environment and disparate treatment of Arabs and Muslims was not appropriately recognized nor adequately addressed by the judicial branch of Colorado in the presence of an exceptionally aggressive prosecutorial arm of Colorado's executive branch.[4]

SUMMARY

This case involves the right of a criminal defendant to obtain the benefit of trial by an impartial jury, as provided by the Sixth Amendment to the Constitution of the United States and applied to the states through the Fourteenth Amendment.

Petitioner, a Saudi national and a Muslim, was convicted in 2006 of unlawful sexual contact,

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[3] August 30, 2006, Asharq Alawsat, "Saudi students await the sentencing of Homaidan al Turki case," http://www.aawsat.com /english/news.asp?section=1&id=6198 (last viewed December 17, 2009).

[4] See examples of the Arab/Muslim victimization or discrimination identified by the United States Department of Justice, Civil Rights Division, Initiative to Combat Post-9/11 Discriminatory Backlash, http://www.justice.gov/crt/ legalinfo/nordwg_mission.php (last viewed on December 17, 2009) and the American-Arab Anti-Discrimination Committee Research Institute's "Report on Hate Crimes and Discrimination Against Arab Americans 2003-2007" (2008) at 34, (describing hate crimes and forms of discrimination expressed against Arab-Americans).

extortion, false imprisonment, conspiracy to commit false imprisonment, and theft in connection with his alleged treatment of Z.A., a female Muslim housekeeper from Indonesia.

Petitioner was denied rights guaranteed under the United States Constitution when the trial court seated a juror who had advised the trial court that his views about Islam might impair his ability to render an impartial verdict. Notwithstanding that this revelation of actual bias occurred prior to the trial court's administration of the jury service oath, Petitioner's request to excuse this juror for cause or to allow additional *voir dire* was still denied. Under these special circumstances, the decision to seat juror C.M. violated Petitioner's Sixth Amendment right to trial by an impartial jury and his Fourteenth Amendment right to due process.

The Colorado Court of Appeals ratified this constitutional error by ruling that a juror's revelation of bias must be unequivocal throughout *voir dire*. This constitutional violation was exacerbated because the prosecutorial arm of Colorado capitalized on the trial court's error by conspicuously playing to the jury's anti-Arab/anti-Muslim bias throughout the trial.

Thus, the State of Colorado, through its executive (prosecutorial) and judicial branches, has deprived Petitioner of the federal constitutional protections due to him. Accordingly, Saudi Arabia requests this Court to review whether the state trial court complied with its obligation to excuse jurors, or at least permit questioning of their prejudices during

voir dire, in cases where the overall circumstances and surroundings present the likelihood of racial and religious bias.

REASONS FOR GRANTING THE WRIT

At numerous critical points in history, the United States Supreme Court has vindicated the right to an impartial jury of a defendant that belongs to a protected class or a disenfranchised group by protecting access to *voir dire* by the accused when special circumstances exist suggesting a high-likelihood that veniremen may harbor prejudices toward the defendant's class or group. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Turner v. Murray*, 476 U.S. 28 (1986); *Morford v. U.S.*, 339 U.S. 258 (1950); *accord Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981).

Since a case by case review is undertaken in order to determine whether "special circumstances" exist, a careful review of the facts in the proceedings below is critical to understanding the Kingdom's concern as presented in Petitioner's Petition for Writ of Certiorari. These facts clearly demonstrate that the potential for bias was inextricably intertwined with the substance of this Arab-Muslim's trial.

THE LIMITED *VOIR DIRE* PROCEEDINGS CONDUCTED BY THE COLORADO TRIAL COURT

The Colorado trial court's very limited oral *voir dire* process with the 106 members of the venire panel (of which Juror C.M. was number seventy-one)

emphasized the general inquiry of whether the jurors would "be able to base their decision(s) strictly on the evidence presented." *See e.g.* (R:2629:15-17). Relying on panel members to raise their hands in response to general questions, the trial court never asked if any individual venire member harbored anti-Muslim or anti-Arab biases or attitudes.[5] With only forty-five minutes (thirty seconds per potential juror) to examine the entire jury pool, Petitioner could not meaningfully probe attitudes regarding Juror C.M.'s ethnicity and religious faith. (R2635:9-12.)

Just before the *petit* jury was empanelled, C.M. tried repeatedly to raise his *admitted* bias. (R2751:24-25.) C.M. expressed in various ways his concern that Petitioner's religion, which "has come to light" and "will be at issue here" places "the laws of God . . . higher than the laws of man." (R2754:19-2755:4.) He stated that he had not spoken up previously thinking it unlikely that he would be seated on the jury.[6] C.M. advised that he was "more

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[5] The written juror questionnaire completed by all prospective jurors, asked whether they had any "reaction" to the fact that the case involved Muslims. *People v. Al-Turki*, No. 06CA2104, slip op. at 22 (10th Cir. Jan. 22, 2009). The absence of any recorded "reaction" by C.M. on that questionnaire, however, did not establish the absence of bias, especially given his subsequent revelations and the oblique wording of the question.

[6] Although possessing a high number, he was the last potential juror seated as a *petit* juror. Neither defense counsel nor the State questioned C.M. during the limited period permitted by the trial court. (Defense counsel: "[H]is number was in the '70s and we just - - neither counsel got there.") (R2756:21-2757:2.)

likely to believe" that Petitioner "would commit a crime" to the extent his religion conflicted with the laws of the United States. C.M. went on to state: "notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the belief [Petitioner] would be obeying religion versus law." (R2754:24-2755:5 and R2755:14-17.)

The juror bias issue occurred late on the first day after one of the prosecutors announced a need to leave due to a child care pick up issue. (R2750:24-2751:6.) The trial court, noting it was late and the jury commissioner's office was closed, expressed concern that we "don't want to lose the progress we've made [in empanelling the petit jury **before the end of the day**]" by excusing Juror C.M. (R2754:1-5.) Thus, instead of probing C.M.'s "issue with **that** religion," i.e. Islam (emphasis added), the trial court summarily concluded that C.M. was not expressing "any problem with" his duty to base his decision on the evidence and the applicable "legal principles." (R2756:1-8 and R2755:18-25.) The court immediately empanelled the jury, simply noting that C.M. had "previously indicated" in the *voir dire* that he could be "fair and impartial." (R2756:10-14.)

Juror C.M. was seated as the last action of the first trial day over Petitioner's objection and request for limited *voir dire* in order to probe further C.M.'s bias against Petitioner. (R2757:5-6 and R2756:21-2757:4.)

THE PROSECUTION'S ANTI-MUSLIM STATEMENTS

The State's case was organized around a theme designed to incite bias. The prosecution began its case by calling out the word "hijab," defining it as "an Arabic term" that "means to isolate or to hide from view or to conceal" and presenting a mannequin wearing a hijab to the jury as its first trial exhibit. The State continued to build its case around the incendiary theme that the wearing of the hijab rendered Z.A. invisible, using the word "invisible" to describe Z.A. six times in its opening argument. (R2789:20; R2792:3; R2792:12; R2795:20; R2797:9; R2803:18; *see also* R2803:19-20).

Seeking to bolster Z.A.'s uncorroborated testimony, the prosecution interrupted their direct examination of Z.A. to put on an "expert" in "Islamic and Muslim culture" and "women's issues." (R3434:18-3435:4). The bias theme permeated the trial, as set forth in further detail in the Petition for Writ of Certiorari at 5-7.

SPECIAL CIRCUMSTANCES WARRANTING CONSTITUTIONAL PROTECTION EXIST

The United States government, through its laws and judicial system, has sought to ensure that all individuals, regardless of race, ethnicity or religious belief, are treated fairly and justly.

These safeguards include the constitutional guarantee to a trial before an impartial jury, as set

forth in the Sixth Amendment. A corollary to this constitutional guarantee is the ability of the parties to seek *voir dire* of potential jurors for possible bias when there is a "significant likelihood" that racial or similarly dangerous prejudice might infect the jurors' deliberations and their ability to fairly and impartially consider the evidence and issue a verdict. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); *accord Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973).

Here, a potential juror expressed a bias against Muslims. The court did not question the juror about this bias and refused to allow Petitioner to question the juror. In light of the prevalence of anti-Muslim and anti-Arab sentiment in the United States, this case was one in which there was a "significant likelihood" that racial, ethnic and/or religious bias might taint jury deliberations and impair the jurors' ability to be fair and impartial.

CONCLUSION

A criminal defendant is entitled by the Sixth and Fourteenth Amendments to the United States Constitution to have twelve unbiased jurors. As this Court noted in *Parker v. Gladden*, 385 U.S. 363, 366 (1966), "Petitioner was entitled to be tried by twelve, not nine or ten [or as here simply eleven], impartial and unprejudiced jurors." *See also Davis v. Georgia*, 429 U.S. 122 (1976). Petitioner was denied rights under the United States Constitution to trial by an impartial jury when as a matter of expediency over constitutionally warranted caution Juror C.M. was

seated as the twelfth juror despite his expression of actual bias against Muslims. This miscarriage of justice raises concern within the government of Saudi Arabia as to whether the right to a trial by an impartial jury afforded to U.S. citizens in state courts is equally available to Saudi nationals.

Accordingly, the Kingdom of Saudi Arabia respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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